

1 Christy D. Joseph (#136785)  
 2 cjoseph@swlaw.com  
 3 Nathan W. Hicks (#236269)  
 nhicks@swlaw.com  
 4 SNELL & WILMER L.L.P.  
 600 Anton Boulevard, Suite 1400  
 Costa Mesa, CA 92626-7689  
 Telephone: (714) 427-7000  
 5 Facsimile: (714) 427-7799

6 Attorneys for Defendant April Alcorn  
 7

8 UNITED STATES DISTRICT COURT – SOUTHERN DISTRICT OF  
 9 CALIFORNIA

10  
 11 CHAD MCKINNEY, an individual,  
 12 Plaintiff,

13 v.

14 APOLLO GROUP, INC.,  
 15 UNIVERSITY OF PHOENIX, a  
 Corporation, MECHELLE  
 16 BONILLA, an Enrollment Manager  
 at UNIVERSITY OF PHOENIX,  
 KYAN FLYNN, Director of  
 17 Enrollment at UNIVERSITY OF  
 PHOENIX, APRIL ALCORN, an  
 Employees Relations Consultant at  
 UNIVERSITY OF PHOENIX,  
 18 CARLYN LINDSTEN, Associate  
 Director of Enrollment at  
 UNIVERSITY OF PHOENIX

19  
 20 Defendants

21 CASE NO. 07-CV-2373 WQH CAB  
 22

23 **APRIL ALCORN'S  
 24 MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 MOTION TO DISMISS  
 PLAINTIFF'S COMPLAINT FOR  
 LACK OF PERSONAL  
 JURISDICTION, OR, IN THE  
 ALTERNATIVE, MOTION FOR  
 MORE DEFINITE STATEMENT**

25 **[FRCP 12(b)(2); 12(b)(5); 12(b)(6);  
 12(e).]**

26 Date: October 20, 2008

27 Time: 11:00 a.m.

28 Courtroom: 4

Judge: Hon. William Q. Hayes

29 **NO ORAL ARGUMENT UNLESS  
 REQUESTED BY THE COURT**

30  
 31  
 32  
 33  
 34  
 35  
 36  
 37  
 38  
 39  
 40  
 41  
 42  
 43  
 44  
 45  
 46  
 47  
 48  
 49  
 50  
 51  
 52  
 53  
 54  
 55  
 56  
 57  
 58  
 59  
 60  
 61  
 62  
 63  
 64  
 65  
 66  
 67  
 68  
 69  
 70  
 71  
 72  
 73  
 74  
 75  
 76  
 77  
 78  
 79  
 80  
 81  
 82  
 83  
 84  
 85  
 86  
 87  
 88  
 89  
 90  
 91  
 92  
 93  
 94  
 95  
 96  
 97  
 98  
 99  
 100  
 101  
 102  
 103  
 104  
 105  
 106  
 107  
 108  
 109  
 110  
 111  
 112  
 113  
 114  
 115  
 116  
 117  
 118  
 119  
 120  
 121  
 122  
 123  
 124  
 125  
 126  
 127  
 128  
 129  
 130  
 131  
 132  
 133  
 134  
 135  
 136  
 137  
 138  
 139  
 140  
 141  
 142  
 143  
 144  
 145  
 146  
 147  
 148  
 149  
 150  
 151  
 152  
 153  
 154  
 155  
 156  
 157  
 158  
 159  
 160  
 161  
 162  
 163  
 164  
 165  
 166  
 167  
 168  
 169  
 170  
 171  
 172  
 173  
 174  
 175  
 176  
 177  
 178  
 179  
 180  
 181  
 182  
 183  
 184  
 185  
 186  
 187  
 188  
 189  
 190  
 191  
 192  
 193  
 194  
 195  
 196  
 197  
 198  
 199  
 200  
 201  
 202  
 203  
 204  
 205  
 206  
 207  
 208  
 209  
 210  
 211  
 212  
 213  
 214  
 215  
 216  
 217  
 218  
 219  
 220  
 221  
 222  
 223  
 224  
 225  
 226  
 227  
 228  
 229  
 230  
 231  
 232  
 233  
 234  
 235  
 236  
 237  
 238  
 239  
 240  
 241  
 242  
 243  
 244  
 245  
 246  
 247  
 248  
 249  
 250  
 251  
 252  
 253  
 254  
 255  
 256  
 257  
 258  
 259  
 260  
 261  
 262  
 263  
 264  
 265  
 266  
 267  
 268  
 269  
 270  
 271  
 272  
 273  
 274  
 275  
 276  
 277  
 278  
 279  
 280  
 281  
 282  
 283  
 284  
 285  
 286  
 287  
 288  
 289  
 290  
 291  
 292  
 293  
 294  
 295  
 296  
 297  
 298  
 299  
 300  
 301  
 302  
 303  
 304  
 305  
 306  
 307  
 308  
 309  
 310  
 311  
 312  
 313  
 314  
 315  
 316  
 317  
 318  
 319  
 320  
 321  
 322  
 323  
 324  
 325  
 326  
 327  
 328  
 329  
 330  
 331  
 332  
 333  
 334  
 335  
 336  
 337  
 338  
 339  
 340  
 341  
 342  
 343  
 344  
 345  
 346  
 347  
 348  
 349  
 350  
 351  
 352  
 353  
 354  
 355  
 356  
 357  
 358  
 359  
 360  
 361  
 362  
 363  
 364  
 365  
 366  
 367  
 368  
 369  
 370  
 371  
 372  
 373  
 374  
 375  
 376  
 377  
 378  
 379  
 380  
 381  
 382  
 383  
 384  
 385  
 386  
 387  
 388  
 389  
 390  
 391  
 392  
 393  
 394  
 395  
 396  
 397  
 398  
 399  
 400  
 401  
 402  
 403  
 404  
 405  
 406  
 407  
 408  
 409  
 410  
 411  
 412  
 413  
 414  
 415  
 416  
 417  
 418  
 419  
 420  
 421  
 422  
 423  
 424  
 425  
 426  
 427  
 428  
 429  
 430  
 431  
 432  
 433  
 434  
 435  
 436  
 437  
 438  
 439  
 440  
 441  
 442  
 443  
 444  
 445  
 446  
 447  
 448  
 449  
 450  
 451  
 452  
 453  
 454  
 455  
 456  
 457  
 458  
 459  
 460  
 461  
 462  
 463  
 464  
 465  
 466  
 467  
 468  
 469  
 470  
 471  
 472  
 473  
 474  
 475  
 476  
 477  
 478  
 479  
 480  
 481  
 482  
 483  
 484  
 485  
 486  
 487  
 488  
 489  
 490  
 491  
 492  
 493  
 494  
 495  
 496  
 497  
 498  
 499  
 500  
 501  
 502  
 503  
 504  
 505  
 506  
 507  
 508  
 509  
 510  
 511  
 512  
 513  
 514  
 515  
 516  
 517  
 518  
 519  
 520  
 521  
 522  
 523  
 524  
 525  
 526  
 527  
 528  
 529  
 530  
 531  
 532  
 533  
 534  
 535  
 536  
 537  
 538  
 539  
 540  
 541  
 542  
 543  
 544  
 545  
 546  
 547  
 548  
 549  
 550  
 551  
 552  
 553  
 554  
 555  
 556  
 557  
 558  
 559  
 560  
 561  
 562  
 563  
 564  
 565  
 566  
 567  
 568  
 569  
 570  
 571  
 572  
 573  
 574  
 575  
 576  
 577  
 578  
 579  
 580  
 581  
 582  
 583  
 584  
 585  
 586  
 587  
 588  
 589  
 590  
 591  
 592  
 593  
 594  
 595  
 596  
 597  
 598  
 599  
 600  
 601  
 602  
 603  
 604  
 605  
 606  
 607  
 608  
 609  
 610  
 611  
 612  
 613  
 614  
 615  
 616  
 617  
 618  
 619  
 620  
 621  
 622  
 623  
 624  
 625  
 626  
 627  
 628  
 629  
 630  
 631  
 632  
 633  
 634  
 635  
 636  
 637  
 638  
 639  
 640  
 641  
 642  
 643  
 644  
 645  
 646  
 647  
 648  
 649  
 650  
 651  
 652  
 653  
 654  
 655  
 656  
 657  
 658  
 659  
 660  
 661  
 662  
 663  
 664  
 665  
 666  
 667  
 668  
 669  
 670  
 671  
 672  
 673  
 674  
 675  
 676  
 677  
 678  
 679  
 680  
 681  
 682  
 683  
 684  
 685  
 686  
 687  
 688  
 689  
 690  
 691  
 692  
 693  
 694  
 695  
 696  
 697  
 698  
 699  
 700  
 701  
 702  
 703  
 704  
 705  
 706  
 707  
 708  
 709  
 710  
 711  
 712  
 713  
 714  
 715  
 716  
 717  
 718  
 719  
 720  
 721  
 722  
 723  
 724  
 725  
 726  
 727  
 728  
 729  
 730  
 731  
 732  
 733  
 734  
 735  
 736  
 737  
 738  
 739  
 740  
 741  
 742  
 743  
 744  
 745  
 746  
 747  
 748  
 749  
 750  
 751  
 752  
 753  
 754  
 755  
 756  
 757  
 758  
 759  
 760  
 761  
 762  
 763  
 764  
 765  
 766  
 767  
 768  
 769  
 770  
 771  
 772  
 773  
 774  
 775  
 776  
 777  
 778  
 779  
 780  
 781  
 782  
 783  
 784  
 785  
 786  
 787  
 788  
 789  
 790  
 791  
 792  
 793  
 794  
 795  
 796  
 797  
 798  
 799  
 800  
 801  
 802  
 803  
 804  
 805  
 806  
 807  
 808  
 809  
 810  
 811  
 812  
 813  
 814  
 815  
 816  
 817  
 818  
 819  
 820  
 821  
 822  
 823  
 824  
 825  
 826  
 827  
 828  
 829  
 830  
 831  
 832  
 833  
 834  
 835  
 836  
 837  
 838  
 839  
 840  
 841  
 842  
 843  
 844  
 845  
 846  
 847  
 848  
 849  
 850  
 851  
 852  
 853  
 854  
 855  
 856  
 857  
 858  
 859  
 860  
 861  
 862  
 863  
 864  
 865  
 866  
 867  
 868  
 869  
 870  
 871  
 872  
 873  
 874  
 875  
 876  
 877  
 878  
 879  
 880  
 881  
 882  
 883  
 884  
 885  
 886  
 887  
 888  
 889  
 890  
 891  
 892  
 893  
 894  
 895  
 896  
 897  
 898  
 899  
 900  
 901  
 902  
 903  
 904  
 905  
 906  
 907  
 908  
 909  
 910  
 911  
 912  
 913  
 914  
 915  
 916  
 917  
 918  
 919  
 920  
 921  
 922  
 923  
 924  
 925  
 926  
 927  
 928  
 929  
 930  
 931  
 932  
 933  
 934  
 935  
 936  
 937  
 938  
 939  
 940  
 941  
 942  
 943  
 944  
 945  
 946  
 947  
 948  
 949  
 950  
 951  
 952  
 953  
 954  
 955  
 956  
 957  
 958  
 959  
 960  
 961  
 962  
 963  
 964  
 965  
 966  
 967  
 968  
 969  
 970  
 971  
 972  
 973  
 974  
 975  
 976  
 977  
 978  
 979  
 980  
 981  
 982  
 983  
 984  
 985  
 986  
 987  
 988  
 989  
 990  
 991  
 992  
 993  
 994  
 995  
 996  
 997  
 998  
 999  
 1000  
 1001  
 1002  
 1003  
 1004  
 1005  
 1006  
 1007  
 1008  
 1009  
 1010  
 1011  
 1012  
 1013  
 1014  
 1015  
 1016  
 1017  
 1018  
 1019  
 1020  
 1021  
 1022  
 1023  
 1024  
 1025  
 1026  
 1027  
 1028  
 1029  
 1030  
 1031  
 1032  
 1033  
 1034  
 1035  
 1036  
 1037  
 1038  
 1039  
 1040  
 1041  
 1042  
 1043  
 1044  
 1045  
 1046  
 1047  
 1048  
 1049  
 1050  
 1051  
 1052  
 1053  
 1054  
 1055  
 1056  
 1057  
 1058  
 1059  
 1060  
 1061  
 1062  
 1063  
 1064  
 1065  
 1066  
 1067  
 1068  
 1069  
 1070  
 1071  
 1072  
 1073  
 1074  
 1075  
 1076  
 1077  
 1078  
 1079  
 1080  
 1081  
 1082  
 1083  
 1084  
 1085  
 1086  
 1087  
 1088  
 1089  
 1090  
 1091  
 1092  
 1093  
 1094  
 1095  
 1096  
 1097  
 1098  
 1099  
 1100  
 1101  
 1102  
 1103  
 1104  
 1105  
 1106  
 1107  
 1108  
 1109  
 1110  
 1111  
 1112  
 1113  
 1114  
 1115  
 1116  
 1117  
 1118  
 1119  
 1120  
 1121  
 1122  
 1123  
 1124  
 1125  
 1126  
 1127  
 1128  
 1129  
 1130  
 1131  
 1132  
 1133  
 1134  
 1135  
 1136  
 1137  
 1138  
 1139  
 1140  
 1141  
 1142  
 1143  
 1144  
 1145  
 1146  
 1147  
 1148  
 1149  
 1150  
 1151  
 1152  
 1153  
 1154  
 1155  
 1156  
 1157  
 1158  
 1159  
 1160  
 1161  
 1162  
 1163  
 1164  
 1165  
 1166  
 1167  
 1168  
 1169  
 1170  
 1171  
 1172  
 1173  
 1174  
 1175  
 1176  
 1177  
 1178  
 1179  
 1180  
 1181  
 1182  
 1183  
 1184  
 1185  
 1186  
 1187  
 1188  
 1189  
 1190  
 1191  
 1192  
 1193  
 1194  
 1195  
 1196  
 1197  
 1198  
 1199  
 1200  
 1201  
 1202  
 1203  
 1204  
 1205  
 1206  
 1207  
 1208  
 1209  
 1210  
 1211  
 1212  
 1213  
 1214  
 1215  
 1216  
 1217  
 1218  
 1219  
 1220  
 1221  
 1222  
 1223  
 1224  
 1225  
 1226  
 1227  
 1228  
 1229  
 1230  
 1231  
 1232  
 1233  
 1234  
 1235  
 1236  
 1237  
 1238  
 1239  
 12310  
 12311  
 12312  
 12313  
 12314  
 12315  
 12316  
 12317  
 12318  
 12319  
 12320  
 12321  
 12322  
 12323  
 12324  
 12325  
 12326  
 12327  
 12328  
 12329  
 12330  
 12331  
 12332  
 12333  
 12334  
 12335  
 12336  
 12337  
 12338  
 12339  
 12340  
 12341  
 12342  
 12343  
 12344  
 12345  
 12346  
 12347  
 12348  
 12349  
 12350  
 12351  
 12352  
 12353  
 12354  
 12355  
 12356  
 12357  
 12358  
 12359  
 12360  
 12361  
 12362  
 12363  
 12364  
 12365  
 12366  
 12367  
 12368  
 12369  
 12370  
 12371  
 12372  
 12373  
 12374  
 12375  
 12376  
 12377  
 12378  
 12379  
 12380  
 12381  
 12382  
 12383  
 12384  
 12385  
 12386  
 12387  
 12388  
 12389  
 12390  
 12391  
 12392  
 12393  
 12394  
 12395  
 12396  
 12397  
 12398  
 12399  
 123100  
 123101  
 123102  
 123103  
 123104  
 123105  
 123106  
 123107  
 123108  
 123109  
 123110  
 123111  
 123112  
 123113  
 123114  
 123115  
 123116  
 123117  
 123118  
 123119  
 123120  
 123121  
 123122  
 123123  
 123124  
 123125  
 123126  
 123127  
 123128  
 123129  
 123130  
 123131  
 123132  
 123133  
 123134  
 123135  
 123136  
 123137  
 123138  
 123139  
 123140  
 123141  
 123142  
 123143  
 123144  
 123145  
 123146  
 123147  
 123148  
 123149  
 123150  
 123151  
 123152  
 123153  
 123154  
 123155  
 123156  
 123157  
 123158  
 123159  
 123160  
 123161  
 123162  
 123163  
 123164  
 123165  
 123166  
 123167  
 123168  
 123169  
 123170  
 123171  
 123172  
 123173  
 123174

## 1 TABLE OF CONTENTS

	<b>2 Page</b>
I. INTRODUCTION.....	3 2
II. THE COURT LACKS JURISDICTION OVER ALCORN (FRCP 4 RULE 12(b)(2)) .....	4 3
III. THE COURT LACKS PERSONAL JURISDICTION OVER 5 ALCORN BECAUSE MCKINNEY'S SERVICE WAS DEFECTIVE (FRCP 12(b)(2); 12(b)(5))	
A. McKinney Failed To Serve Alcorn.....	7 5
B. McKinney Did Not Obtain a Waiver of Service From Alcorn.....	8 7
IV. THE COURT SHOULD DISMISS THE COMPLAINT BECAUSE 9 MCKINNEY VIOLATED THE COURT'S JULY 22, 2008, ORDER.....	9 8
V. THE COURT SHOULD DISMISS THE COMPLAINT BECAUSE IT 10 FAILS TO PROVIDE A BASIS UPON WHICH RELIEF CAN BE GRANTED .....	10 8
A. The Court May Dismiss Patently Defective Complaints.....	11 8
B. McKinney's Purported Claim Under the False Claims Act (31 12 U.S.C. § 3729) Provides No Basis Upon Which Relief Can Be Granted .....	13 9
C. McKinney's Purported Claim Under Title VII of the Civil 14 Rights Act of 1964 and amendments to Title VII of the Civil 15 Rights Act of 1991 (42 U.S.C. § 2000e) Provides No Basis Upon Which Relief Can Be Granted.....	14 11
D. McKinney's Other Purported Claims Provide No Basis Upon 16 Which Relief Can Be Granted.....	15 12
VI. THE COURT SHOULD DISMISS THE COMPLAINT BECAUSE IT 17 FAILS TO COMPLY WITH FRCP RULE 8.....	17 13
VII. THE COURT SHOULD DISMISS MCKINNEY'S COMPLAINT 18 WITH PREJUDICE.....	18 14
VIII. ALTERNATIVELY, THE COURT SHOULD REQUIRE 19 MCKINNEY TO FILE A MORE DEFINITE STATEMENT UNDER FRCP RULE 12(e) .....	19 15
IX. CONCLUSION .....	20 17

**Snell & Wilmer**  
 LLP  
 LAW OFFICES  
 600 Anton Boulevard, Suite 1400  
 Costa Mesa, California 92626-7689  
 (714) 427-7000

## 1 TABLE OF AUTHORITIES

	Page
3 FEDERAL CASES	
4 <i>Barsella v. United States</i> , 5 135 F.R.D 64 (S.D.N.Y 1991).....	14
6 <i>Belle v. Chase Home Finance, LLC</i> , 7 No. 06CV2454 WQH (LSP), 2007 WL 3232505, at *8 (S.D. Cal. May 22, 2007) .....	6
8 <i>Brockmeyer v. May</i> , 9 383 F.3d 798 (9th Cir. 2004).....	6
10 <i>Cellars v. Pacific Coast Packaging, Inc.</i> , 11 189 F.R.D. 575 (N.D. Cal. 1981) .....	15
12 <i>Conley v. Gibson</i> , 13 355 U.S. 41 (1957).....	8, 16
14 <i>Eldridge v. Block</i> , 15 832 F.2d 1132 (9th Cir. 1987) .....	13
16 <i>Estate of Ford v. Ramirez-Palmer</i> , 17 301 F.3d 1043 (9th Cir. 2002) .....	7
18 <i>Famolare, Inc. v. Edison Bros. Stores, Inc.</i> , 19 525 F. Supp. 940 (E.D. Cal. 1981) .....	16
20 <i>Gen-Probe, Inc. v. Amoco Corp.</i> , 21 926 F. Supp. 948 (S.D. Cal. 1988) .....	16
22 <i>Graham v. United States</i> , 23 79 Fed. Appx. 992, No. 03-15240, 2003 WL 22514528, at *1 (9th Cir. June 2, 2003).....	2, 7
24 <i>Hamilton v. Endell</i> , 25 981 F. 2d 1062 (9th Cir. 1992) .....	7
26 <i>Hirsh v. Blue Cross, Blue Shield</i> , 27 800 F.2d 1474 (9th Cir. 1986) .....	6
28 <i>Holden v. Hagoplan</i> , 29 978 F.2d 1115 (9th Cir. 1992) .....	8
30 <i>In re Syntex Corp. Sec's Litig.</i> , 31 95 F.3d 922 (9th Cir. 1996) .....	8
32 <i>Jackson v. Hayakawa</i> , 33 682 F.2d 1344 (9th Cir. 1982) .....	7

## TABLE OF AUTHORITIES (continued)

Page	
2	<i>Jones v. Cnty. Redevelopment Agency of the City of Los Angeles</i> , 733 F.2d 646 (9th Cir. 1984) ..... 13
4	<i>McHenry v. Renne</i> , 84 F.3d 1172 (9th Cir. 1996) ..... 15
6	<i>Nevijel v. North Coast Life Ins. Co.</i> , 651 F.2d 671 (9th Cir. 1981) ..... 15
7	
8	<i>Pejic v. Hughes Helicopters, Inc.</i> , 840 F.2d 667 (9th Cir. 1988) ..... 12
9	
10	<i>Roberston v. Dean Witter Reynolds, Inc.</i> , 749 F.2d 530 (9th Cir. 1984) ..... 8
11	
12	<i>Sherman v. Yakahi</i> , 549 F.2d 1287 (9th Cir. 1977) ..... 14
13	
14	<i>Trent v. Valley Elect. Assoc.</i> , 41 F.3d 524 (9th Cir. 1994) ..... 12
15	
16	<i>Usher v. City of Los Angeles</i> , 828 F.2d 556 (9th Cir. 1987) ..... 8
17	
18	<i>Von Poppenheim v. Portland Boxing and Wrestling Commission</i> , 442 F.2d 1047 (9th Cir. 1971), cert. denied, 404 U.S. 1039 (1972) ..... 15
19	
20	<i>Western Min. Council v. Watt</i> , 643 F.2d 618 (9th Cir. 1981) ..... 8
21	
22	
23	
24	
25	<b>STATUTES</b>
26	<i>Espindola v. Nunez</i> , 199 Cal. App. 3d 1389, 1392 (1988) ..... 6
27	
28	<i>Sec. Dynamics Techs., Inc. v. Active Card Networks, Inc.</i> , No. 95-20870SW, 1996 WL 263648, at *1 (N.D. Cal. May 13, 1996) ..... 16
29	
30	<i>Stafford v. Mach</i> , 64 Cal. App. 4th 1174, 1182 (1998) ..... 6
31	
32	
33	
34	
35	
36	
37	
38	
39	
40	
41	
42	
43	
44	
45	
46	
47	
48	
49	
50	
51	
52	
53	
54	
55	
56	
57	
58	
59	
60	
61	
62	
63	
64	
65	
66	
67	
68	
69	
70	
71	
72	
73	
74	
75	
76	
77	
78	
79	
80	
81	
82	
83	
84	
85	
86	
87	
88	
89	
90	
91	
92	
93	
94	
95	
96	
97	
98	
99	
100	
101	
102	
103	
104	
105	
106	
107	
108	
109	
110	
111	
112	
113	
114	
115	
116	
117	
118	
119	
120	
121	
122	
123	
124	
125	
126	
127	
128	
129	
130	
131	
132	
133	
134	
135	
136	
137	
138	
139	
140	
141	
142	
143	
144	
145	
146	
147	
148	
149	
150	
151	
152	
153	
154	
155	
156	
157	
158	
159	
160	
161	
162	
163	
164	
165	
166	
167	
168	
169	
170	
171	
172	
173	
174	
175	
176	
177	
178	
179	
180	
181	
182	
183	
184	
185	
186	
187	
188	
189	
190	
191	
192	
193	
194	
195	
196	
197	
198	
199	
200	
201	
202	
203	
204	
205	
206	
207	
208	
209	
210	
211	
212	
213	
214	
215	
216	
217	
218	
219	
220	
221	
222	
223	
224	
225	
226	
227	
228	
229	
230	
231	
232	
233	
234	
235	
236	
237	
238	
239	
240	
241	
242	
243	
244	
245	
246	
247	
248	
249	
250	
251	
252	
253	
254	
255	
256	
257	
258	
259	
260	
261	
262	
263	
264	
265	
266	
267	
268	
269	
270	
271	
272	
273	
274	
275	
276	
277	
278	
279	
280	
281	
282	
283	
284	
285	
286	
287	
288	
289	
290	
291	
292	
293	
294	
295	
296	
297	
298	
299	
300	
301	
302	
303	
304	
305	
306	
307	
308	
309	
310	
311	
312	
313	
314	
315	
316	
317	
318	
319	
320	
321	
322	
323	
324	
325	
326	
327	
328	
329	
330	
331	
332	
333	
334	
335	
336	
337	
338	
339	
340	
341	
342	
343	
344	
345	
346	
347	
348	
349	
350	
351	
352	
353	
354	
355	
356	
357	
358	
359	
360	
361	
362	
363	
364	
365	
366	
367	
368	
369	
370	
371	
372	
373	
374	
375	
376	
377	
378	
379	
380	
381	
382	
383	
384	
385	
386	
387	
388	
389	
390	
391	
392	
393	
394	
395	
396	
397	
398	
399	
400	
401	
402	
403	
404	
405	
406	
407	
408	
409	
410	
411	
412	
413	
414	
415	
416	
417	
418	
419	
420	
421	
422	
423	
424	
425	
426	
427	
428	
429	
430	
431	
432	
433	
434	
435	
436	
437	
438	
439	
440	
441	
442	
443	
444	
445	
446	
447	
448	
449	
450	
451	
452	
453	
454	
455	
456	
457	
458	
459	
460	
461	
462	
463	
464	
465	
466	
467	
468	
469	
470	
471	
472	
473	
474	
475	
476	
477	
478	
479	
480	
481	
482	
483	
484	
485	
486	
487	
488	
489	
490	
491	
492	
493	
494	
495	
496	
497	
498	
499	
500	
501	
502	
503	
504	
505	
506	
507	
508	
509	
510	
511	
512	
513	
514	
515	
516	
517	
518	
519	
520	
521	
522	
523	
524	
525	
526	
527	
528	
529	
530	
531	
532	
533	
534	
535	
536	
537	
538	
539	
540	
541	
542	
543	
544	
545	
546	
547	
548	
549	
550	
551	
552	
553	
554	
555	
556	
557	
558	
559	
560	
561	
562	
563	
564	
565	
566	
567	
568	
569	
570	
571	
572	
573	
574	
575	
576	
577	
578	
579	
580	
581	
582	
583	
584	
585	
586	
587	
588	
589	
590	
591	
592	
593	
594	
595	
596	
597	
598	
599	
600	
601	
602	
603	
604	
605	
606	
607	
608	
609	
610	
611	
612	
613	
614	
615	
616	
617	
618	
619	
620	
621	
622	
623	
624	
625	
626	
627	
628	
629	
630	
631	
632	
633	
634	
635	
636	
637	
638	
639	
640	
641	
642	
643	
644	
645	
646	
647	
648	
649	
650	
651	
652	
653	
654	
655	
656	
657	
658	
659	
660	
661	
662	
663	
664	
665	
666	
667	
668	
669	
670	
671	
672	
673	
674	
675	
676	
677	
678	
679	
680	
681	
682	
683	
684	
685	
686	
687	
688	
689	
690	
691	
692	
693	
694	
695	
696	
6	

1 **TABLE OF AUTHORITIES**  
 2 **(continued)**

3 **Page**

4 **TREATISES**

5 California Code of Civil Procedure § 415.10 ..... 6

6 **CONSTITUTIONAL PROVISIONS**

7 Federal Rules of Civil Procedure Rule 4 ..... 2, 5, 7, 6

8 Federal Rules of Civil Procedure Rule 8 ..... 3, 13, 14, 16

9 Federal Rules of Civil Procedure Rule 12 ..... 3, 7, 14, 15

10 Federal Rules of Civil Procedure Rule 41 ..... 14, 15

11 **OTHER AUTHORITIES**

12 2 James Wm. Moore, et al., *Moore's Federal Practice*,  
 13 12.36[1] (3d ed. 2000) ..... 16

14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

Snell & Wilmer  
 LLP  
 LAW OFFICES  
 600 Anton Boulevard, Suite 1400  
 Costa Mesa, California 92626-7689  
 (714) 427-7000

I.

## **INTRODUCTION**

3           The Court should dismiss plaintiff Chad McKinney’s (“McKinney”)  
4           complaint for damages (“Complaint”) against April Alcorn (“Alcorn”) for several  
5           separate reasons. First, the Court lacks personal jurisdiction over Alcorn since she  
6           does not reside in California and has not consented to the Court’s jurisdiction in this  
7           matter. Second, McKinney failed to properly serve Alcorn in accordance with Rule  
8           4 of the Federal Rules of Civil Procedure (“FRCP”) because McKinney did not  
9           properly serve her via personal service, substitute service, mail service or service by  
10           publication. Although some procedural rules may be relaxed for *pro se* litigants, all  
11           plaintiffs must follow the rules for service of the complaint. *See Graham v. United*  
12           *States*, 79 Fed. Appx. 992, 994, No. 03-15240, 2003 WL 22514528, at \*1 (9th Cir.  
13           June 2, 2003). This procedural step is important not only to ensure due process, but  
14           also for jurisdictional reasons, because absent proper service, a court cannot obtain  
15           jurisdiction over the defendant.

16        Third, McKinney's Complaint should be dismissed for failure to state a claim  
17 upon which relief can be granted. The caption of McKinney's Complaint states that  
18 it is "for violation of Federal False Claims Act and for violation of the Civil Rights  
19 Act 1964 and the amendments to Title VII of the Civil Rights Act of 1991-  
20 Retliation-Wrongful Termination & Employment Discrimination Civil Action" and  
21 lists seven causes of action:

22           1. Retaliation pursuant to the False Claims Act § 3729;

23           2. Retaliation under Title VII;

24           3. Wrongful Termination;

25           4. False Imprisonment;

26           5. Intentional Infliction of Emotional Distress;

27           6. Defamation; and

28           7. Equal Pay.

1 [Complaint, 16:8-17:14.]

2 The Complaint, however, contains no comprehensible recitation of facts or  
 3 the basis for any of McKinney's purported claims, nor does it give fair notice of the  
 4 purported acts or omissions, what actions are attributed to what defendants, how  
 5 Alcorn's conduct damaged McKinney, or even what damage McKinney suffered.

6 Finally, McKinney failed to comply with the Court's July 22, 2008, Order  
 7 ("Order") quashing McKinney's prior failed attempt at serving Alcorn with the  
 8 Complaint and mandating that he properly serve Alcorn within 45 days of the  
 9 Order.

10 Accordingly, Alcorn brings this motion to dismiss McKinney's Complaint  
 11 pursuant to FRCP Rule 12(b)(5) because the Complaint was improperly served.  
 12 Alcorn also brings this motion to dismiss pursuant to FRCP Rule 12(b)(2) because  
 13 the Court lacks personal jurisdiction over her. Additionally, Alcorn brings this  
 14 motion pursuant to Rule 12(b)(6) because the Complaint fails to state a claim upon  
 15 which relief may be granted and fails to comply with FRCP Rule 8. Finally, Alcorn  
 16 asks that she be dismissed from this matter due to McKinney's failure to comply  
 17 with the Court's July 22, 2008, Order. In the alternative, if the Court declines to  
 18 dismiss the Complaint for these reasons and finds that it can exert jurisdiction over  
 19 Alcorn, it is requested that the Court order McKinney to file a more definite  
 20 statement pursuant to FRCP Rule 12(e).

21  
 22 II.

23 **THE COURT LACKS JURISDICTION OVER ALCORN (FRCP RULE**  
 24 **12(b)(2)).**

25 Personal jurisdiction refers to the Court's power to render a judgment that  
 26 either commands the defendant's personal obedience or impose obligations on the  
 27 defendant that will be enforced by other courts. *Burnham v. Superior Court* (1990)  
 28 495 U.S. 604, 609-610; *Pennoyer v. Neff* (1877) 95 U.S. 714, 720-722. Unless

1 jurisdiction is waived, a judgment rendered by a court lacking personal jurisdiction  
 2 that purports to impose personal obligations on the defendant violates constitutional  
 3 requirements of due process of law. *Id.*; *Ruhrgas AG v. Marathon Oil, Co.* (1999)  
 4 526 U.S. 574, 583.

5 Due process requires an adequate basis for jurisdiction over a party sought to  
 6 be bound by the Court's judgment or decree. The three recognized bases for  
 7 exercise of personal jurisdiction are:

- 8 • Service within the state;
- 9 • Domicile within the state; or
- 10 • Consent.

11 *Pennoyer v. Neff, supra* at 722. Subsequent cases also recognize a "minimum  
 12 contacts" standard with the forum state as an alternative basis for local jurisdiction.  
 13 *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316.

14 Here, McKinney improperly provides a blank return of service document that  
 15 does not illustrate how or where he attempted to provide Alcorn with service of  
 16 process of the Complaint. [Declaration of April Alcorn In Support of Motion to  
 17 Dismiss, ("Alcorn Decl.") ¶ 3, Ex. 1, pg 2.] In fact, Alcorn has never been served  
 18 with any documents in this matter. [Alcorn Decl., ¶ 2.] Furthermore, Alcorn did  
 19 not consent to the Court's jurisdiction nor is she domiciled within California. [Id.,  
 20 ¶¶ 1 and 2.]

21 Finally, Alcorn does not even come close to requiring the minimum contacts  
 22 analysis required to demonstrate that the forum state has a sufficient relationship  
 23 with her to make it reasonable to require her to defend the current action in  
 24 California. A non-resident individual is not subject to personal jurisdiction based  
 25 upon the acts in the forum state undertaken in her corporate capacity. *Club Car,*  
*26 Inc. v. Club Car (Quebec) Import, Inc.* (11th Cir. 2004) 362 F3d 775, 784.  
 27 Therefore, the Court cannot obtain jurisdiction over Alcorn, a non-resident of  
 28 California, simply because she was required to interact with McKinney as part of

1 her corporate duties. Accordingly, the Court lacks personal jurisdiction over  
 2 Alcorn, and McKinney's Complaint against her should be dismissed.  
 3  
 4

5 **III.**

6 **THE COURT LACKS PERSONAL JURISDICTION OVER ALCORN**  
 7 **BECAUSE MCKINNEY'S SERVICE WAS DEFECTIVE (FRCP 12(b)(2);**  
 8 **12(b)(5)).**

9 Pursuant to the Order, McKinney "failed to properly serve any of the  
 10 Defendants" during his prior attempt at service, and "service of process upon each  
 11 Defendant is quashed." [Declaration of Nathan Hicks In Support of Motion to  
 12 Dismiss Plaintiff's Complaint ("Hicks Decl."), ¶ 2, Ex. 1, 9:9-24.] Further, the  
 13 Order held:

14 Plaintiff has forty-five (45) days from the date of this  
 15 order in which to either (1) properly serve each Defendant  
 16 in accordance with applicable law, or (2) file a waiver of  
 17 service.

18 [Id., 9:24-26.] McKinney failed to do either of the Order's options and therefore  
 19 his Complaint against Alcorn should be dismissed.

20 **A. McKinney Failed To Serve Alcorn.**

21 FRCP Rule 4(e) provides in pertinent part:

22 Unless otherwise provided by federal law, service upon  
 23 an individual from whom a waiver has not been obtained  
 24 and filed, [...] may be effected in any judicial district of  
 25 the United States:

26 (1) pursuant to the law of the state in which the district  
 27 court is located [...]; or  
 28 (2) by delivering a copy of the summons and of the  
 29 complaint to the individual or by leaving copies thereof at  
 30 the individual's dwelling house or usual place of abode  
 31 with some person of suitable age and discretion then  
 32 residing therein or by delivering a copy of the summons

1 and complaint to an agent authorized by appointment or  
 2 by law to receive service of process.

3 FRCP Rule 4(e); *LSJ Investment Co., Inc. v. O.L.D., Inc.* 167 F. 3d 320, 322-323  
 4 (6th Cir. 1999). To that end, California state law allows for service upon an  
 5 individual by delivering a copy of the summons and complaint:

6 Via personal delivery or an authorized agent for service of  
 7 process;

8 [or]

9 Substitute service coupled with mailing after a good faith  
 10 effort at personal service has been attempted;

11 [or]

12 Mail service, coupled with acknowledgement of receipt;

13 [or]

14 Service by publication.

15 Cal. Code Civ. Proc. §§ 415.10, 415.20, 415.30, 415.50.

16 Thus, under both federal and state law, service of summons upon an  
 17 individual is only proper if made by personal service to the individual or their  
 18 authorized agent to accept service of process or by substitute service at the  
 19 individual's "dwelling house or usual place of abode." *See id.*; FRCP Rule 4(e)(2).  
 20 California, however, also allows substitute service to be effected at the individual's  
 21 residence *or* place of employment as long as a good faith attempt at personal  
 22 service was made and the substitute service is coupled with a mailing of a copy of  
 23 the summons and complaint to the defendant. Cal. Code Civ. Proc. § 415.20.

24 When a defendant challenges service of process, a plaintiff bears the burden  
 25 of showing that service is valid under Rule 4. *Brockmeyer v. May*, 383 F.3d 798,  
 26 800 (9th Cir. 2004); *Belle, supra, citing Hirsh v. Blue Cross, Blue Shield*, 800 F.2d  
 27 1474, 1477 (9th Cir. 1986); *Evartt v. Superior Court*, 89 Cal. App. 3d 795, 801  
 28 (1979). Two or three attempts to personally serve defendant at a "proper place"  
 ordinarily qualifies as "reasonable diligence" at attempting personal service.

1       *Espindola v. Nunez*, 199 Cal. App. 3d 1389, 1392 (1988); *Stafford v. Mach*, 64 Cal.  
 2       App. 4th 1174, 1182 (1998). Moreover, if a plaintiff fails to serve a defendant in  
 3       accordance with Rule 4, the court lacks jurisdiction over that defendant. *Jackson v.*  
 4       *Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982).

5           As stated above, McKinney simply mailed a copy of the Complaint to  
 6       Alcorn's place of work with a blank proof of service document. [Alcorn Decl., ¶ 3,  
 7       Exs. 1 and 2.] McKinney did not attempt to personally serve the Complaint upon  
 8       Alcorn and hence failed to comply with the requirements for service under both  
 9       federal and California law. FRCP Rule 4(e); Cal. Code Civ. Proc. § 415.20;  
 10       *Khourie, Crew & Jaeger v. Sabek, Inc.*, 220 Cal. App. 3d 1009, 1015 (1990). In  
 11       fact, Alcorn has never been served with any documents in this matter and is not  
 12       aware of anyone else accepting any documents on her behalf. [Id., ¶ 2.]

13           While procedural rules may be relaxed for *pro se* litigants, even a *pro se*  
 14       plaintiff must comply with the rules for service of process. *See Graham v. United*  
 15       *States*, 79 Fed. Appx. 992, 994, No. 03-15240, 2003 WL 22514528, at \*1 (9th Cir.  
 16       June 2, 2003) *citing Hamilton v. Endell*, 981 F.2d 1062, 1065 (9th Cir. 1992)  
 17       (abrogated on other grounds by *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043,  
 18       1045 (9th Cir. 2002)).

19

20       **B.       McKinney Did Not Obtain a Waiver of Service From Alcorn.**

21           Alcorn's counsel sent McKinney a correspondence inquiring whether  
 22       McKinney would request a waiver of service from the parties. [Hicks Decl., ¶ 3,  
 23       Ex. 2.] McKinney failed to respond to Alcorn's inquiry and never obtained a  
 24       waiver of service from Alcorn.

25           Accordingly, because McKinney did not properly serve Alcorn nor obtain a  
 26       waiver of service, the Court lacks personal jurisdiction over her and the Complaint  
 27       should be dismissed pursuant to FRCP Rules 12(b)(2) and 12(b)(5) for this reason  
 28       also.

IV.

**THE COURT SHOULD DISMISS THE COMPLAINT BECAUSE**  
**MCKINNEY VIOLATED THE COURT'S JULY 22, 2008, ORDER.**

As stated above, McKinney failed to comply with the Order and his Complaint should be dismissed.

V.

**THE COURT SHOULD DISMISS THE COMPLAINT BECAUSE IT FAILS  
TO PROVIDE A BASIS UPON WHICH RELIEF CAN BE GRANTED.**

## A. The Court May Dismiss Patently Defective Complaints.

A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. The Court may dismiss a complaint as a matter of law either for lack of a cognizable theory or the absence of sufficient facts alleged under a cognizable legal theory. *Roberston v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). Thus, the Court should dismiss a claim if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In making this determination, the Court must accept as true all material allegations in the complaint and draw all reasonable inferences in the plaintiff’s favor. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). While allegations of material fact are taken as true, however, a plaintiff may not rely on conclusory allegations and unwarranted inferences to defeat dismissal. See e.g., *In re Syntex Corp. Sec’s Litig.*, 95 F.3d 922, 926 (9th Cir. 1996); *Holden v. Hagoplan*, 978 F.2d 1115, 1121 (9th Cir. 1992). Also, the Court does not “assume the truth of legal conclusions merely because they are cast in the form of factual allegations.” *Western Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

As explained more fully below, this Court should dismiss McKinney's Complaint because it fails to state a claim upon which relief may be granted.

1       **B.     McKinney's Purported Claim Under the False Claims Act (31 U.S.C.**  
 2       **§ 3729) Provides No Basis Upon Which Relief Can Be Granted.**

3       The Complaint also fails to distinguish among – or even clearly set out – the  
 4       various claims being alleged. For example, the Complaint mentions an action for  
 5       retaliation arising under the False Claims Act, 31 U.S.C. § 3729 (“FCA”) in  
 6       McKinney’s “Statement of the Case” and “Legal Claims,” but no supporting facts  
 7       even mentioning the FCA can be found in his “Statement of Facts.” [Complaint,  
 8       2:9-11; 16:8-19.] In fact, McKinney’s reference the FCA contains the following  
 9       mystifying statements:

10       In 1986, Congress added provisions in 31 U.S.C Sec.  
 11       3730(h): ‘Any employee who is discharged, demoted,  
 12       suspended, threatened, harassed, or in any other manner  
 13       discriminated against in the terms and conditions of  
 14       employment by his or her employer because of lawful  
 15       acts done by the employee on behalf of his employer or  
 16       others *in furtherance of an action* under this section,  
 17       including investigation for, initiation of, testimony for, or  
 18       assistance in an action filed or to be filed under this  
 19       section, shall be entitled to all relief necessary to make the  
 20       employee whole.’

21       [*Id.*, (emphasis added).]

22       McKinney does not reference anything he did “in furtherance of action under  
 23       this section.” In fact, McKinney does not provide any supporting facts at all for  
 24       this claim, but rather repeats a statute that does not apply to him under any  
 25       circumstances. The FCA addresses the situation that if a person attempts to defraud  
 26       the government to obtain payment/property then he/she will be liable:

27       to the United States Government for a civil penalty of not  
 28       less than \$5,000 and not more than \$10,000, plus 3 times  
 29       the amount of damages which the Government sustains  
 30       because of the act of that person [...].

31       31 U.S.C. 3729(a). For an “action” to exist, however, it may only be brought by the  
 32       Attorney General or by a private person in the name of the United States  
 33       Government. 31 U.S.C. §§ 3730(a), (b). Moreover, there are special requirements

1 for a private person to bring an action under the FCA that McKinney never did. In  
 2 pertinent part:

3 **(b) Actions by Private Persons.—**

4 (1) A person may bring a civil action for a violation of  
 5 section 3729 for the person and for the United States  
 6 Government. The action shall be brought in the name of  
 7 the Government. The action may be dismissed only if the  
 8 court and the Attorney General give written consent to the  
 9 dismissal and their reasons for consenting.

10 (2) A copy of the complaint and written disclosure of  
 11 substantially all material evidence and information the  
 12 person possesses shall be served on the Government  
 13 pursuant to Rule 4(d)(4) of the Federal Rules of Civil  
 14 Procedure. The complaint shall be filed in camera, shall  
 15 remain under seal for at least 60 days, and shall not be  
 16 served on the defendant until the court so orders. The  
 17 Government may elect to intervene and proceed with the  
 18 action within 60 days after it receives both the complaint  
 19 and the material evidence and information.

20 31 U.S.C. § 3730(b).

21 Furthermore, the FCA bars the following actions:

22 **(e) Certain Actions Barred.—**

23 (3) In no event may a person bring an action under  
 24 subsection (b) which is based upon allegations or  
 25 transactions which are the subject of a civil suit or an  
 26 administrative civil money penalty proceeding in which  
 27 the Government is already a party.

28 (4)

29 (A) No court shall have jurisdiction over an action under  
 30 this section based upon the public disclosure of  
 31 allegations or transactions in a criminal, civil, or  
 32 administrative hearing, in a congressional, administrative,  
 33 or Government Accounting Office report, hearing, audit,  
 34 or investigation, or from the news media, unless the  
 35 action is brought by the Attorney General or the person  
 36 bringing the action is an original source of the  
 37 information.

38 (B) For purposes of this paragraph, “original source”  
 39 means an individual who has direct and independent  
 40 knowledge of the information on which the allegations are  
 41 based and has voluntarily provided the information to the  
 42 Government before filing an action under this section  
 43 which is based on the information.

1 31 U.S.C. § 3730(e).

2 McKinney has not provided any facts indicating that he has performed lawful  
 3 acts in furtherance of an existing “action” under the FCA. Furthermore, McKinney  
 4 has not provided any facts that demonstrate that an “action” brought by either the  
 5 Attorney General or in the name of the United States Government even exists.  
 6 Indeed, it appears that McKinney’s claim under the FCA may be barred since he  
 7 has not asserted that he is an “original source” of information provided to the  
 8 United States Government as is required under 31 U.S.C. section 3730(e)(4).

9 Accordingly, McKinney has not properly alleged an action under the FCA  
 10 upon which relief can be granted.

11

12 **C. McKinney’s Purported Claim Under Title VII of the Civil Rights Act of  
 13 1964 and amendments to Title VII of the Civil Rights Act of 1991 (42  
 14 U.S.C. § 2000e) Provides No Basis Upon Which Relief Can Be Granted.**

15 McKinney’s Complaint similarly fails to state a claim for violation of  
 16 Title VII of Civil Rights Act, as amended (“Title VII”). McKinney asserts that he  
 17 suffered “discriminatory behavior” and was retaliated against in violation of Title  
 18 VII. [Complaint, 2:19-21; 16:20-24.] As with McKinney’s claim under the FCA,  
 19 the only two references to Title VII are found in the “Statement of the Case” and  
 20 “Legal Claims” and no supporting facts are found in his “Statement of Facts”. [Id.]  
 21 In fact, it cannot be determined from McKinney’s unintelligible Complaint whether  
 22 he is alleging disparate treatment, retaliation or both.<sup>1</sup>

23 Critically fatal to McKinney’s Title VII claims against Alcorn is that only the  
 24 employer, and not individuals, can be held liable for damages under Title VII.  
 25 Accordingly, McKinney’s Title VII claims against Alcorn fail, and no facts could  
 26 be alleged to support a claim upon which relief could be granted.

27

28 <sup>1</sup> It will be assumed that McKinney’s Title VII claim is limited to retaliation since  
 this is what he reported to the EEOC. [Hicks Decl., ¶ 3 Exs. B & C.]

1            Nevertheless, even without this support, McKinney's claims still fail. Title  
 2 VII makes it unlawful for covered employers to hire or discharge any individual, or  
 3 otherwise discriminate against any individual based on race, color, religion, sex or  
 4 national origin ("protected class"). 42 U.S.C. § 2000e *et seq.* Yet, McKinney does  
 5 not allege that he belongs to a class protected under Title VII. To succeed on a  
 6 retaliation claim, McKinney must have supporting facts to allege: (1) he engaged  
 7 in some protected conduct (protected by Title VII); (2) he suffered an adverse  
 8 employment action; and (3) the adverse employment action was taken against him  
 9 because of the protected activity. *Trent v. Valley Elect. Assoc.*, 41 F.3d 524, 526  
 10 (9th Cir. 1994). McKinney does not aver any supporting facts that support his  
 11 allegations of retaliation in violation of Title VII.

12            To establish a *prima facie* case of discriminatory treatment,<sup>2</sup> McKinney must  
 13 show supporting facts that: (1) he is a member of a protected class; (2) he was  
 14 capable of performing his job; and (3) he was treated differently because of his  
 15 protected class status. *Pejic v. Hughs Helicopters, Inc.*, 840 F.2d 667, 672 (9th Cir.  
 16 1988). McKinney has alleged no facts in support of his claim of discrimination in  
 17 violation of Title VII.

18            Accordingly, McKinney has not properly alleged an action under Title VII  
 19 upon which relief can be granted.

20

21 **D. McKinney's Other Purported Claims Provide No Basis Upon Which  
 22 Relief Can Be Granted.**

23            Although the Complaint lists seven causes of action<sup>3</sup> under the section  
 24 entitled "Legal Claims," the remainder of the Complaint appears to consist of  
 25

26

---

27 <sup>2</sup> As stated above, if McKinney is alleging discrimination, then he has not  
 28 exhausted the required administrative remedies in order to properly plead this issue.

<sup>3</sup> None of McKinney's causes of action distinguish what actions are purportedly  
 attributable to what defendant.

1 protracted “cut and paste” language<sup>4</sup> that is internally inconsistent, ambiguous and  
 2 fails to provide any support for the purported claims listed in the caption. Instead,  
 3 McKinney simply lists five other causes of action with no factual support or legal  
 4 basis.<sup>5</sup>

5 To the extent McKinney is asserting these or any other claims against Alcorn  
 6 (which is, itself, unclear from the wording of the Complaint), McKinney has failed  
 7 to describe these claims with any specificity or to set forth the required elements of  
 8 those claims. Accordingly, Alcorn is unable to determine which claims are being  
 9 alleged against her, and McKinney has failed to state any claim upon which relief  
 10 can be granted.

11

## 12 VI.

13

### **14 THE COURT SHOULD DISMISS THE COMPLAINT BECAUSE IT FAILS TO COMPLY WITH FRCP RULE 8.**

15

FRCP Rule 8 requires a plaintiff to set forth “a short and plain statement of  
 16 the claim showing that the [plaintiff] is entitled to relief.” FRCP Rule 8(a)(2).  
 17 Similarly, each claim must be “simple, concise, and direct.” FRCP Rule 8(e)(2).  
 18 These rules are designed to ensure that a complaint gives fair notice to defendants  
 19 and states the elements of the claim plainly and succinctly. *Jones v. Cnty.*  
*20 Redevelopment Agency of the City of Los Angeles*, 733 F.2d 646, 649 (9th Cir.  
 21 1984).

22

When the complaint is written by a *pro se* litigant, these rules are relaxed and  
 23 the complaint is held to a less stringent standard. *Eldridge v. Block*, 832 F.2d 1132,  
 24 1136 (9th Cir. 1987). Nevertheless, if a complaint contains nothing more than

25

---

<sup>4</sup> The same language is found in McKinney’s EEOC complaint. [Hicks Decl., Exs. 3 and 4.]

26

<sup>5</sup> McKinney simply lists: wrongful termination, false imprisonment, intentional infliction of emotional distress, defamation and equal pay under the remaining causes of action without any reference to a legal basis or how these causes of action apply to him.

1 conclusory allegations, unsupported by any facts, it fails to state a claim under  
 2 Rule 8. *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977); *se also*,  
 3 *Barsella v. United States*, 135 F.R.D 64, 66 (S.D.N.Y 1991) (policy requiring  
 4 courts to liberally construe *pro se* complaints “does not mandate that a court system  
 5 sustain every *pro se* complaint even if it is incoherent, rambling, and unreadable”).  
 6 Here, McKinney’s complaint is incoherent, rambling, unreadable and fails to  
 7 comply with Rule 8.

8 The Complaint fails to distinguish among – or even clearly set out – the  
 9 various claims being alleged.<sup>6</sup> And, despite containing a heading entitled  
 10 “Statement of Facts,” the body of the Complaint is prolix, confusing, and in many  
 11 areas – meaningless. Further, it is not clear what relief McKinney seeks or how the  
 12 allegations support the relief sought. The Complaint is simply a recitation of  
 13 disconnected ideas wrapped with conclusory allegations seeking some sort of  
 14 unintelligible relief. The Complaint, therefore, fails to comply with Rule 8 and  
 15 should be dismissed under FRCP Rule 12(b)(6) for failure to state a claim upon  
 16 which relief can be granted.

17

18 **VII.**

19 **THE COURT SHOULD DISMISS**

20 **MCKINNEY’S COMPLAINT WITH PREJUDICE.**

21 The factors a court may consider in determining whether to dismiss a  
 22 complaint with prejudice under FRCP Rule 41(b) include: (1) the plaintiff’s status  
 23 as a *pro se* litigant; (2) the burden on the defendants and their right to be free from  
 24 costly and harassing litigation; (3) the burden confusing and prolix complaints  
 25 place on the court system; (4) the strength of plaintiff’s case; and, (5) the feasibility  
 26 of less drastic alternatives, such as allowing further amendment. *See, e.g.*,

27

---

28 <sup>6</sup> See Part IV above for a further discussion of the deficiencies in McKinney’s  
 claims.

1 *McHenry v. Renne*, 84 F.3d 1172, 1179-1180 (9th Cir. 1996); *Nevigel v. North*  
 2 *Coast Life Ins. Co.*, 651 F.2d 671, 674-675 (9th Cir. 1981); *Von Poppenheim v.*  
 3 *Portland Boxing and Wrestling Commission*, 442 F.2d 1047, 1053 (9th Cir. 1971),  
 4 *cert. denied*, 404 U.S. 1039 (1972). Under the circumstances of this dispute, these  
 5 factors heavily favor dismissal with prejudice.

6 McKinney has filed a protracted, rambling, incomprehensible Complaint that  
 7 utterly fails to allege any facts to support any of his claims, and that is not even  
 8 clear as to which claims are being asserted, and against which defendants.  
 9 McKinney cannot assert anything in an amended pleading that will give merit to his  
 10 baseless claims. As such, the Court should dismiss McKinney's Complaint with  
 11 prejudice pursuant to FRCP Rule 41(b).

12

13 **VIII.**

14 **ALTERNATIVELY, THE COURT SHOULD REQUIRE MCKINNEY TO**  
 15 **FILE A MORE DEFINITE STATEMENT UNDER FRCP RULE 12(e).**

16 If the Court declines to dismiss the Complaint, finds that service of process  
 17 was sufficient under the FRCP and that the Court has jurisdiction over Alcorn, the  
 18 Court should require McKinney to file a more definite statement.

19 FRCP Rule 12(e) protects defendants from having to guess at the meaning of  
 20 complaints like the one brought by McKinney:

21 If a pleading to which a responsive pleading is permitted  
 22 is so vague or ambiguous that a party cannot reasonably  
 23 be required to frame a responsive pleading, the party may  
 move for a more definite statement before interposing a  
 responsive pleading.

24 FRCP Rule 12(e).

25 A complaint may state a claim for relief, but may still be so vague and  
 26 ambiguous as to require a plaintiff to provide a more definite statement. *See*  
 27 *Cellars v. Pacific Coast Packaging, Inc.*, 189 F.R.D. 575, 578 (N.D. Cal. 1981);

1       *Famolare, Inc. v. Edison Bros. Stores, Inc.*, 525 F. Supp. 940, 949 (E.D. Cal. 1981).  
 2       When claims, such as those made by McKinney are so indefinite that the defendant  
 3       cannot ascertain the nature of the claim being asserted, a defendant cannot  
 4       reasonably be expected to frame a proper response. *Id.*

5       A motion for a more definite statement is appropriate where allegations do  
 6       not comply with the pleading requirements identified in FRCP Rule 8. 2 James  
 7       Wm. Moore, et al., *Moore's Federal Practice*, 12.36[1] (3d ed. 2000). Under  
 8       Rule 8, a pleading must give "fair notice on the grounds for the various claims" and  
 9       "requires more than empty boilerplate." *Gen-Probe, Inc. v. Amoco Corp.*, 926 F.  
 10      Supp. 948, 961 (S.D. Cal. 1988); *see also Conley v. Gibson*, 355 U.S. 41, 47  
 11      (1957). Therefore, if a pleading is not "clear enough to provide the defendant with  
 12      a sufficient basis to frame a responsive pleading" a more definite statement is  
 13      appropriate. *Sec. Dynamics Techs., Inc. v. Active Card Networks, Inc.*, No. 95-  
 14      20870SW, 1996 WL 263648, at \*1 (N.D. Cal. May 13, 1996).

15       Here, for the reasons set forth above, McKinney's Complaint is so  
 16       ambiguous and unintelligible that Alcorn cannot reasonably be required to frame a  
 17       responsive pleading. Therefore, if the Court does not grant the Rule 12(b)(6)  
 18       motion, the Court should order McKinney to file a more definite statement.

19       ///

20       ///

21       ///

22       ///

23       ///

24       ///

25       ///

26       ///

27       ///

28       ///

1  
IX.2  
**CONCLUSION**3  
For the reasons stated above, Alcorn respectfully requests that the Court  
4 dismiss McKinney's Complaint against her with prejudice. In the alternative, if the  
5 Court finds that it has jurisdiction over Alcorn and the Court declines to dismiss the  
6 Complaint, she respectfully requests that the Court require McKinney to file a more  
7 definite statement.8  
Date: September 9, 20089  
SNELL & WILMER L.L.P.10  
By: s/Nathan Hicks11  
Christy Joseph12  
Nathan W. Hicks13  
Attorneys for Defendant April  
14 Alcorn15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
Snell & Wilmer  
LAW OFFICES  
600 Anton Boulevard, Suite 1400  
Costa Mesa, California 92626-7689  
(714) 427-7000

**PROOF OF SERVICE**

**McKinney v. Apollo Group, Inc., et al.  
USDC, Southern – Case No. 07-CV-2373**

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-7689.

On September 9, 2008, I served, in the manner indicated below, the foregoing document described as **APRIL ALCORN'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF PERSONAL JURISDICTION, OR, IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Chad McKinney 6266 Madeline Street, Apt. #61 San Diego, CA 92115	Plaintiff, Pro Se Tel: (619) 634-3566  TRACKING # 798508102292
United States District Court Attention: Hon. Judge William Q. Hayes Courtroom 4 940 Front Street, Room 4290 San Diego, CA 92101-8900	Courtesy Copy Tel: (619) 557-5600  TRACKING # 792104054237

I am employed in the office of a member of the bar of this court at whose direction the service was made.

BY FEDERAL EXPRESS: I caused such envelopes to be delivered by air courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)).

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on September 9, 2008, at Costa Mesa, California.

Anh Dufour